***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# 74-1329

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# United States Court of Appeals

**For the Second Circuit**

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ISLAND CREEK COAL SALES COMPANY,

*Plaintiff-Appellant,*

*v.*

INDIANA-KENTUCKY ELECTRIC CORPORATION,

*Defendant-Appellee.*

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**Appeal from the United States District Court for the Southern District of New York**

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## REPLY BRIEF FOR PLAINTIFF-APPELLANT

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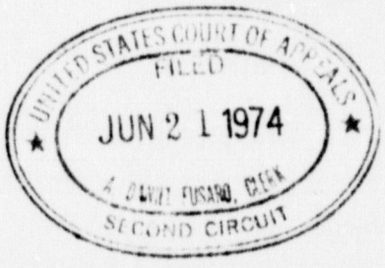


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### Statement

IKEC's answering brief (pp. 8-14) treats the joint submission of June 10, 1971 as if it existed *in vacuo,* without reference either to the arbitration clause in the coal supply agreement pursuant to which the submission was executed or to IKEC's subsequent attempt unilaterally to submit to arbitration Island Creek's termination of the agreement pursuant to Article IV, §6 thereof. These, however, are relevant facts which, as we shall demonstrate in Point I of this reply brief, at the very least raise a question as to

the parties' intent in executing the joint submission that should not have been resolved by the District Court on affidavits alone.

In Point II we shall demonstrate the inherently untenable character of IKEC's contentions with respect to the construction of Article IV, §6 of the coal supply agreement. Although the District Court did not rule on these contentions, they are again pressed by IKEC in Point II of the answering brief (pp. 14-21).

## POINT I

**Whether Island Creek's right to terminate pursuant to Article IV, §6 was submitted to arbitration by the joint submission of June 10, 1971 is a question of fact which should not have been decided without a trial.**

We agree with IKEC that "Parties to a dispute may at any time submit the dispute to arbitration, whether or not it falls within the terms of a pre-existing agreement to arbitrate future disputes . . ." (IKEC br., p. 11). For this proposition, IKEC cites substantial authority: *Ficek* v. *Southern Pacific Company,* 338 F.2d 655, 656-57 (9th Cir. 1964), *cert. denied,* 380 U.S. 988 (1965) and *Amicizia Societa Nav.* v. *Chilean Nitrate & Iodine S. Corp.,* 274 F.2d 805, 809 (2d Cir.), *cert. denied,* 363 U.S. 843 (1960) (*Ibid.*). But it cites no authority, and we have found none, for the further proposition, essential to its conclusion that "Island Creek Submitted to Arbitration the Question of Its Rights to Terminate the Coal Supply Agreement" (IKEC br., p. 8), that: (1) where there *is* a pre-existing agreement to arbitrate future disputes and (2) a submission is made

*pursuant to* and *incorporating* that pre-existing agreement, (3) a recital in the submission which apparently conflicts with the terms of the pre-existing agreement *ipso facto* overrides that agreement. To the contrary, the opposite conclusion was reached in the one case most directly in point: *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, 195 F.Supp. 64 (E.D.N.Y. 1961), *aff'd*, 298 F.2d 647 (2d Cir. 1962).

In that case, after a grievance involving "past practices and procedures" (the "Spittel grievance") had been submitted and both the employer and the union had designated an arbitrator in accordance with their collective bargaining agreement, the employer, asserting that this grievance was outside the scope of the matters it had contracted to arbitrate, revoked the authority of the arbitrator it had appointed and refused to proceed. The union moved to compel arbitration. The District Court denied the motion, noting that:

> "The Spittel grievance as submitted to the arbitrators in writing on its face reaches far beyond the confines of the existing agreement." 195 F.Supp. at 67.

In *Procter & Gamble* Judge Bartels conformed the submission to the underlying agreement to arbitrate, just as this Court did in *Amicizia*. The difference in result stems from the difference in the scope of the underlying agreement. The arbitration clause in *Proctor & Gamble* was limited, whereas in *Amicizia*: "Clause 17 of the charter parties is a provision for unrestricted arbitration . . ." (274 F.2d at 807) and "Since Clause 17 of the charter parties is referred to in the submission, the arbitrators

would thereby be invested, through incorporation by reference, with the same breadth of authority as under the clause itself." *Id.* at 809. The reasoning of these decisions is clearly applicable to the instant case, where the submission not only sets forth in full Article VI, §12 of the coal supply agreement, the arbitration clause which expressly excludes from the category of arbitrable disputes those as to "any matter stated herein [*i.e.*, in the agreement] to be within the sole judgment of one of the parties", but incorporates by reference the entire agreement, including Article IV, §6 which specifies the matters left to the sole judgment of the parties.

At the very least, inclusion in the self-same submission of a contention by Island Creek that it was entitled to terminate under Article IV, §6 and of the arbitration clause excepting from arbitration disputes, controversies and claims relative to such termination raises a question as to the parties' intent in executing the submission, a question which cannot be resolved by characterizing the submission as an "integrated" contract (IKEC br., p. 11) or a recital of general policy considerations with respect to arbitration (*Id.* at 13). As this Court said in *El Hoss Engineering & Transport Co.* v. *American Independent Oil Co.*, 289 F. 2d 346, 350 (2d Cir.), *cert. denied*, 368 U.S. 837 (1961):

> "Although the U.S. Arbitration Act looks favorably upon arbitration it does not dictate that we should disregard parties' contractual agreements that contain specific language outlining the boundaries of the areas intended to be arbitrable areas.
>
> 'The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the

> process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness.' Marchant v. Mead-Morrison Mfg. Co., 1929, 252 N.Y. 284, 299, 169 N.E. 386, 391 (Cardozo, C.J.)."

Moreover, the "parties' contract, or agreement to arbitrate, is not always found locked neatly within the four corners of an instrument. As in the case of any other contract, the intent of the parties with respect to an agreement to arbitrate . . . is not necessarily manifested expressly, but may be implied from the parties' conduct and/or the surrounding circumstances." *Foster-Forbes Glass Co.* v. *Glass Blowers Ass'n,* 263 F.Supp. 729, 732 (N.D. Ind. 1967). Here, not only the conduct of parties (Island Creek's subsequent termination of the coal supply agreement pursuant to Article IV, §6 and IKEC's subsequent filing of a unilateral submission relating to such termination) but the "surrounding circumstances", in particular the non-existence of a dispute over termination under Article IV, §6 at the time when the joint submission was executed,* are persuasive that Island Creek did not intend by the joint submission to waive all of its rights under Article IV, §6—and that IKEC so understood.

On the record, we submit, there is a genuine issue of material fact as to the parties' intent which should have precluded the granting of IKEC's motion for summary

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* *Cf. Nager Electric Co., Inc.* v. *Weisman Construction Corp.,* 29 App. Div. 2d 939, 289 N.Y.S. 2d 473 (1st Dep't 1968), holding that an arbitration demand "must state the specific nature of the *existing* controversy . . ." (Emphasis by the court).

judgment. See *Union Insurance Society of Canton, Ltd.* v. *Wm. Gluckin & Co.*, 389 F.2d 946, 951 (2d Cir. 1965). "Summary judgment procedure, of course, is available only in cases where there is no genuine issue of material fact. Rule 56(c), Fed. R. Civ. P." *Lemelson* v. *Ideal Toy Corporation*, 408 F.2d 860, 863 (2d Cir. 1969). And "all doubts as to the existence of a 'genuine issue of material fact' must be resolved against the moving party . . . the District Court must, therefore, take that view of the evidence most favorable to the opponent of the moving party, giving the opponent the benefit of all favorable inferences that may reasonably be drawn." *Empire Electronics Co.* v. *United States*, 311 F.2d 175 (2d Cir. 1962). Surely the District Court in the case at bar disregarded this injunction.

"[S]ound judicial administration strongly suggests that a court should not attempt to reconstruct the intent of the parties in a complicated factual situation before they have had an opportunity to present evidence on that issue before the fact-trier." *Union Insurance Society of Canton, Ltd.* v. *Wm. Gluckin & Co., supra* at 952. Section 4 of the Federal Arbitration Act, 9 U.S.C. §4, requires no less: "If the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." Island Creek unequivocally denies that it has ever agreed to arbitrate termination pursuant to Article IV, §6. As this Court, reversing and remanding, recently held in *A/S Custodia* v. *Lessin International, Inc.*, Docket No. 74-1149, Second Circuit, June 10, 1974, the District Court should not have determined "on affidavits rather than after an evidentiary hearing . . . disputed issues of fact with respect to the making of an arbitration agreement."

## POINT II

**Disputes, controversies and claims relating to termination pursuant to Artlicle IV, §6 are not arbitrable.**

### A. Compliance with Article IV, §6 is the subject of judicial determination

Article IV, §6 gives Island Creek the right to terminate the coal supply agreement if, in its sole judgment, as a result of "regulations and restrictions related to mining practices", it becomes impossible to continue producing coal and IKEC declines to reimburse Island Creek for expenses incident to corrective steps which Island Creek, in its sole judgment, deems unreasonable. Nevertheless, IKEC contends, "in order to prevent the Seller from being able to terminate arbitrarily" (IKEC br., p. 15) it is "obviously necessary to refer to the arbitrators" (*Ibid.*) the questions: (1) whether regulations or restrictions of the specified type have been imposed; (2) whether Island Creek's decision to terminate was caused by such restrictions or regulations, and (3) what is the amount of the increased expense—in other words, to refer to arbitration anything and everything of substance. This interpretation of the clause,* resulting in a complete emasculation, is absurd on its face. See *Matter of 20th Century-Fox (Screen Guild)*, 17 Misc. 2d 233, 78 N.Y.S. 2d 178 (Sup. Ct. N.Y. Co. 1948) (where the agreement provided that the decision of the company should be "final", neither the decision nor the matters involved therein were arbitrable under a provision for arbitration of all disputes). Equally absurd is

* Island Creek's interpretation of Article IV, §6 is set forth at pages 10-13 of its main brief.

the proffered reason. The choice is not between the arbitral forum and no forum "for determining whether the prerequisites for termination existed" (IKEC br., p. 14), but between the arbitral forum and a judicial forum. In excluding from arbitration matters stated to be in the sole judgment of one of the parties, the parties simply left disputes as to these matters, if any, to be resolved in the courts.

**B. Legislation relating to mine safety is within Article IV, §6**

Article IV, §6 provides in pertinent part that:

> "legislative or regulatory bodies or the courts may impose *regulations or restrictions relating to mining practices* which will make it impossible or impractical for Seller to continue to produce coal hereunder. Such regulations or restrictions *could pertain to, but would not necessarily be limited to,* air pollution, water pollution, waste disposal or surface subsidence." (Emphasis added)

IKEC concedes that the article uses "all-inclusive terms" (IKEC br., p. 17). Nevertheless, solely on the basis of the examples set forth—air pollution, water pollution, waste disposal or surface subsidence, it urges that the provision was meant to apply only to regulations or restrictions of an "ecological" character.

Assuming, *arguendo,* that all the examples actually are ecological in nature, the contention that only regulations or restrictions of that type were intended to be covered conflicts with the express words of the article, which applies without qualification to "regulations or restrictions

relating to mining practices." It goes without saying that the negotiators of the agreement could not foresee *every* type of restriction or regulation that legislative or regulatory bodies or the courts might impose in the future. As IKEC admits, "Legislation and regulation relating to mine safety is no new thing (IKEC br., p. 16). The fact is, safety regulations and restrictions were so well known they scarcely required specification. Ecological regulations and restrictions, on the other hand, were virtually in their infancy when Island Creek and IKEC entered into the coal supply agreement. The National Environmental Policy Act, 42 U.S.C. §4321 *et seq.*, for instance, was not enacted until 1969. Obviously, these far less common types of regulations and restrictions were spelled out lest a claim be made in the future that since they were not prevalent when the agreement was signed, their inclusion was not contemplated by the parties.

Any doubt that the provision was intended to be all-encompassing is dispelled by the following language: "Such regulations or restrictions *could pertain to,* but *would not* necessarily *be limited to* . . ." (Emphasis added). The stated examples—air pollution, water pollution, waste disposal and surface subsidence—in effect exhaust the ecological category. Thus, if it is to have any meaning the phrase "would not necessarily be limited to air pollution . . ." etc. must be read as "would not necessarily be limited to ecological regulations or restrictions". "It is well settled that effect should be given, if possible, to every word, phrase, clause, and sentence of a contract. . . ." *Cities Service Gas Co.* v. *Kelly-Dempsey & Co.*, 111 F.2d 247, 249 (10th Cir. 1940); *Muzak Corp.* v. *Hotel Taft,* 1 N.Y. 2d 42, 46, 150 N.Y.S. 2d 171, 174 (1956). Furthermore, had the parties really meant to limit the

scope of the article to regulations or restrictions of an ecological nature only, they would have had no difficulty in saying so, plainly and unequivocally.

Nor is there any justification for applying the rule of *ejusdem generis* to Article IV, §6, as IKEC urges at pages 17 through 21 of its brief. The identical section of Corpus Juris Secundum referred to by IKEC (17A C.J.S. *Contracts,* §313) admonishes that "the rule can be invoked only when there is some inconsistency or ambiguity in the contract and the meaning of the general provisions is doubtful and requires clarification". There is here no inconsistency or ambiguity whatsoever, nor any doubt as to the established meaning of the general term "regulations and restrictions relating to mining practices".

Moreover, as appears from the very cases which IKEC cites, even if the rule were held to be applicable, it would not support the arguments advanced by IKEC. Thus, in *Union Bankers Insurance Company* v. *National Bank of Commerce,* 241 Ark. 554, 408 S.W. 2d 898 (1966), the court quoted with approval the classic definition of the rule enunciated in BLACK'S LAW DICTIONARY (4th ed. 1957):

> "EJUSDEM GENERIS. Of the same kind, class or nature.
>
> "In the construction of laws, wills, and other instruments, the 'ejusdem generis rule' is, that *where general words follow an enumeration of persons or things, by words of a particular and specific meaning,* such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." (Emphasis added)*

* Among the supporting authorities cited in Black is *Goldsmith* v. *United States,* 42 F.2d 133, 137 (2d Cir.), *cert. denied,* 282 U.S. 837 (1930).

Or, in the words of the court in *President and Directors of Manhattan Co.* v. *Erlandsen,* 36 N.Y.S.2d 136, 138 (Sup. Ct. Queens Co. 1942), *aff'd,* 266 App. Div. 883, 43 N.Y.S.2d 639 (2d Dep't 1943):

> "It is a primary rule of construction that *where general words follow particular or specific terms,* such general words are limited by the particularization." (Emphasis added)

*This* is the "rule of *ejusdem generis* . . . applied generally in every jurisdiction." (IKEC br., p. 18).

And this is the rule that was applied in the vast majority of cases relied on by IKEC, namely: *Brotherhood of Ry. and Steamship Clks.* v. *Railway Express Agency,* 238 F.2d 181 (6th Cir. 1956); *President and Directors of Manhattan Co.* v. *Erlandsen, supra*; *Real Estate-Land Title & Trust Co.* v. *Bankers' Trust Co.,* 104 Pa. Super. 493, 158 A. 634 (1932); *Pennsylvania Turnpike Comm'n* v. *United States F. & G. Co.,* 343 Pa. 543, 23 A.2d 416 (1942); *Union Bankers Insurance Co.* v. *National Bank of Commerce, supra*; *Cronkhite* v. *Falkenstein,* 352 P.2d 396 (Okla. 1960); *Wolf* v. *Blackwell Oil & Gas Co.,* 77 Okla. 81, 186 P. 484 (1920); *Atwood* v. *Rodman,* 355 S.W.2d 206 (Tex. Ct. App. 1962); and *Smith* v. *Second Church of Christ, Scientist,* 87 Ariz. 400, 351 P.2d 1104 (1960). Every one of these cases deals with general words *following* words of particularization. And none of them is in point, for Article IV, Section 6 involves precisely the reverse situation: the general words *precede* the words of particularization.

The two remaining cases cited by IKEC—*Austin Co.* v. *United States,* 314 F.2d 581 (Ct. Cl.), *cert. denied,* 375

U.S. 830 (1963) and *G.T. Schjeldhal Co.* v. *Local Lodge 1680,* 393 F.2d 502 (1st Cir. 1968)—are likewise inapplicable. In these cases, separate contractual provisions, one general and one specific, were read in *pari materia;* the general language was construed to be limited in the same way as the specific because any other construction was destructive of or inconsistent with the contract as a whole.

In *Austin,* the court was faced with the question whether a contractor's failure to develop a workable system of data collection by reason of a mechanical problem which developed when the system was built according to contract specifications was excused because it was "due to causes beyond the control and without the fault or negligence of the Contractor". *Another* and separate provision of the contract excused the contractor from liability for excess costs arising out of such causes, the causes being clearly limited in this provision to instances of *force majeure.* The court found both clauses confined to what it called "extraneous contingencies". In light of the fact that the contractor had itself prepared the specifications under which it promised to perform, substituting them for the original specifications prepared by the Government, the court held that the contractor, with full knowledge of the perils of performance, had assumed the risk of impossibility. It noted that to hold otherwise in these circumstances, *i.e.,* to extend the exculpatory clause to include intrinsic as well as extraneous matters, "would be to say that a contractor assumes nothing upon signing a contract . . ." (314 F.2d at 521), would in short, extinguish the contract itself.

*Schjeldhal* involved one clause at odds with an entire contract, a clause which defined arbitrable grievances in terms broad enough to include employer as well as employee grievances although all the other provisions clearly focused on employee grievances only. The court explained:

> "We recognize that the strong policy favoring labor arbitration requires doubts to be resolved in favor of arbitration .... However, where the undertaking in question was in all other respects oriented toward employee grievances only, the mere fact that the agreement contains a clause which might be more broadly construed if it were not limited by specific provisions is not a sufficient ambiguity. Nor is the belief that it would be preferable had the agreement been broader sufficient reason to make it so .... Our duty to determine whether under a proper construction of the agreement the parties agreed to arbitrate ... does not require us to do violence to principles of contract interpretation." 393 F.2d at 504-05.

## Conclusion

**For the reasons set forth herein and in appellant's main brief, Island Creek respectfully requests this Court to reverse the judgment of the District Court.**

Respectfully submitted,

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